(3)

Supreme Court, U.S.
FILED
DEC 16
CLERK

No. 98-551

In The

Supreme Court of the United States

October Term, 1998

TRIPLE A FIRE PROTECTION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND ROAD SPRINKLER FITTERS LOCAL UNION 669, AFL-CIO.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF TRIPLE A FIRE PROTECTION, INC.

WILLIS C. DARBY, JR.
Counsel of Record
ELIZABETH D. REHM
Post Office Box 2565
Mobile, Alabama 36652
(334) 432-2635

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

REPLY BRIEF OF TRIPLE A FIRE PROTECTION, INC.

The Brief for the National Labor Relations Board in Opposition implies that the petitioner, Triple A Fire Protection, Inc., did not argue in the court of appeals that Triple A "had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support" citing the court of appeals' statement that "[i]n the instant case, [petitioner] makes no such argument." Brief for the National Labor Relations Board, pp. 14-15.

The statement of the court of appeals "[i]n the instant case, [petitioner] makes no such argument" itself abhors the record in the court of appeals. In the Suggestion of En Banc Consideration of Triple A (Appendix O), Triple A framed the following question for en banc consideration:

> Whether the presumption of majority status of a union upon the expiration of a 9(a) agreement is rebutted where the expiring agreement contains provisions which discriminate in favor of union members, against nonmembers and creates a virtual closed shop, or do such provisions support a good faith reasonable doubt about the union's majority support.

(Appendix O, p. 1).

Triple A did not raise the issue of good-faith doubt as to Local 669's majority status for the first time in its Suggestion of En Banc Consideration; the issue was raised in Triple A's initial brief in the court of appeals and in Triple A's reply brief in the court of appeals under the

heading "Triple A Had A Good Faith Doubt of Majority Support," at pages one through five. (Appendix O, p. 3).

Respectfully submitted,

WILLIS C. DARBY, JR.
Counsel of Record
ELIZABETH D. REHM
Post Office Box 2565
Mobile, Alabama 36652
(334) 432-2635

APPENDIX O

EXCERPTS FROM SUGGESTION OF EN BANC CONSIDERATION BY RESPONDENT TRIPLE A FIRE PROTECTION, INC.

Excerpt from page III:

REPRESENTATION OF COUNSEL

. . . .

. . . .

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether the presumption of majority status of a union upon the expiration of a 9(a) agreement is rebutted where the expiring agreement contains provisions which discriminate in favor of union members, against nonmembers and creates a virtual closed shop, or do such provisions support a good faith reasonable doubt about the union's majority support.

2. Is evidence relating to events occurring before and after the 10(b) period admissible on the issue of uncoerced majority.

Excerpt from pages 3 through 12:

A

GOOD FAITH DOUBT OF CONTINUING MAJORITY

The panel's statement that there was "very strong evidence that Local 669 enjoyed majority status . . . , and

that Turner knew that" (D1762, fn. 12),[4] is contrary to *Deklewa* where the Board held that union membership "is not always an accurate barometer of union support," and fringe benefit reports only demonstrate "some degree of compliance with a benefit provision."

Moreover, the statement establishes that the panel failed to realize that "majority" as used in the Act means "uncoerced majority." See *Gissel*, 395 U.S. at 592, 609 ("A bargaining order will not issue . . . if the union obtained the cards [majority] through . . . coercion"); *NLRB v. Electric Vacuum Cleaner*, 315 U.S. 685, 687 (1942) (employer may not assist union even when the union has been selected by an uncoerced majority of its employees); *International Ass'n of Machinists. v. NLRB*, 311 U.S. 72, 79, 81, 82 (1940) (union "did not represent an uncoerced majority of" employees at the time the contract was executed); *Oil Transp. Co. v. NLRB*, 440 F.2d 664, 665 (5th Cir. 1971) (union did not represent an uncoerced majority at time the contract was signed); *Wilber F. Disney*, 145 NLRB 88, 96 (1963) ("the union at no time represented an uncoerced majority of the employees" because of illegal assistance); *Service Employees Int'l Union*, 322 NLRB 402, 414 (1996) ("not necessary to show more than a mathematical uncoerced majority").

The panel correctly stated the applicable law at page 1764-1765, fn. 15 of its decision:

> An employer may withdraw recognition from an incumbent union at any time when such

---

[4] The Board did not rely on any actual majority; the Board only relied on a presumption of continuing majority (D1762).

> withdrawal is not precluded by law, if it can affirmatively establish either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the withdrawal was predicated on a reasonably grounded doubt as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices.

The panel's statement that "[i]n the instant case, Triple A makes no such argument" (D1764-1765, fn 15), abhors the record. We submit that "never represented an uncoerced majority" includes "no longer enjoyed majority status," and encompasses a good faith doubt as to "majority status." Here, Triple A's first brief devoted fifteen pages, pages 23-38, to documentary evidence and arguments supported by citations to the Supreme Court, this court, other circuits, and the Board relating to Triple A's defense that 669 never represented an uncoerced majority of Triple A's employees. In its reply brief, in a five page section entitled "Triple A Had a Good Faith Doubt of Majority Support," Triple A again addressed the issue, including Judge Godbold's decision in *MFP Fire Protection, Inc. v. NLRB*, 101 F.3d 1341, 1343, 1344 (10th Cir. 1996), where Judge Godbold held that MFP "was entitled to offer proof that when it withdrew recognition in 1994 the union did not enjoy majority status or that it then had a good faith doubt of majority support, but it did not do so," and concluded that *MFP* "is a stronger case than Triple A."

Neither the ALJ, the Board, nor the panel considered Triple A's objective, documentary evidence, both before

and after the 10(b) period, that employees were coerced by 669 to become and remain members of 669.

The Taft-Hartley Act of 1947 amended the NLRA to guarantee employees' rights to refrain from union membership and activity, outlawed the closed shop which conditioned employment upon union membership, and made it "an unfair labor practice for a labor organization . . . to restrain or coerce employees in the exercise" of such rights.

Local 669 has maintained a virtual closed shop through egregious unfair labor practices throughout the entire 50 years since the passage of the Taft-Hartley Act through its constitution, bylaws, national agreements, apprenticeship programs, and scholarship loan agreements.

Article 21, § 20 of 669's Constitution (R26:38) provides that:

> No members of Local 669 shall be allowed to resign from the Union subsequent to the determination to strike . . . and any member crossing picket lines established by Local 669 shall be subject to trial and fine. . . .

Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (provision in union's constitution which restricts a member's right to resign during a strike interferes with an employee's free choice and violates § 8(b)(1)(A)).

The Apprenticeship Standards (T3, REX 41:36) provide:

> An Apprentice who satisfactorily completes the probationary period will be considered Grade 1

> Apprentice, initiated into Local Union No. 669 and enrolled in the Related Training Program.

Section 5 of the Working Rules of Local 669 (T3, REX 26:36) provide:

> No member of Local 669 shall work with sprinkler fitters who are not members of a United Association Local, except as may otherwise be provided in a United Association collective bargaining agreement.

The UA Constitution § 154(a) (R16:76) provides in part:

> No journeyman member will be permitted to work with an apprentice or helper who is not a member except apprentices who have made an application for membership in the Local Union and the United Association.

The National Agreement which expired on March 31 in part provided:

> A person not a member of the United Association shall be acceptable for employment as a Journeyman only after he has produced for the Employer sworn affidavits of six (6) years' experience in the Sprinkler Industry . . . on the letterhead of his previous Employer or Employers, and such affidavits have been forwarded to the Union. (T3, REX 41:5, ¶ 4.2).
>
> A person not a member of the [UA] shall be acceptable for employment as an Apprentice after he has met the requirements in the Apprentice Standards, been accepted by the Joint Apprenticeship and Training Committee and issued a probationary Apprentice classification card by the Director of Apprenticeship of

> Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the [UA], these employees shall be paid the Journeyman's rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement. (T3, REX 41:5, ¶ 4.3.)
>
> . . . .
>
> Hiring of Men: Should the Employer fail to secure unemployed 669 Sprinkler Fitter Journeymen or Apprentices from any source available to him, he shall contact the Union requesting a referral of qualified unemployed Sprinkler Fitter Journeymen or Apprentices residing within one-hundred (100) miles of the job site. The Union shall be given seventy-two (72) hours from time of notification to refer qualified unemployed Sprinkler Fitter Journeymen or Apprentices to perform the work involved. (T3, REX 41:7, ¶ 5.1).

In *NLRB v. Local 2, United Ass'n of Journeyman*, 360 F.2d 428 (2d Cir. 1966), enforcing in part 152 NLRB 1093, the court approved the Board's conclusion that contractual provisions allowing union men to be hired without regard to length of service coupled with the United Association's constitutional provision that prohibited union members from working with nonmembers created a virtual closed shop.

In *Ironworkers Local 600*, 134 NLRB 301, 302-3 (1961), the Board held that the practice under a facially lawful hiring hall "of placing *only* its members . . . on the first-priority 'A' list constitutes an unlawful encouragement of membership in the Respondent" union citing *NLRB v.*

Local 803, 218 F.2d 299, 302 (3d Cir. 1955) ("a 'denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act.'")

Local 669's approval was a prerequisite to becoming an apprentice (R31 rejected 6:1075; R4:694, Phillips). *NLRB v. Radio Officers' Union*, 196 F.2d 960, 965 (2d Cir. 1952), aff'd, 347 U.S. 17 (1954) ("refusal of a clearance [was] economic coercion in its most effective form").

Local 669 required contractors to solicit checkoff authorizations from applicants upon employment (R23 rejected 4:727; R27 rejected 7:1289). *NLRB v. Electric Vacuum Cleaner*, 315 U.S. 685, 693 (1942) (requiring membership on first day of employment in the absence of a closed shop agreement "violates . . . the freedom of employees"); *Tribuiani's Detective Agency, Inc.*, 233 NLRB 1121, 1122 n.2 (1977) (soliciting checkoff authorization cards that were substantially the same as 669's violates § 8(a)(2) of the Act).

Local 669 requested Triple A to deduct dues from Triple A employees without valid checkoff authorizations (R122-127 rejected 7:1310; R128 rejected 7:1312; and R129 rejected 7:1312). *Jo-Jo Management Corp.*, 225 NLRB 1133, 1143 (1976), enforced, 556 F.2d 558 (2d Cir. 1977) (deducting dues without a valid checkoff authorization).

Local 669 required apprentices to sign a "Scholarship Loan Agreement" and note which became due if and when the apprentice accepted employment in the pipe fitting industry with an employer who did not maintain a contract with the United Association (R32:1 rejected 4:673). *Joint Apprentices & Training Comm. v. Chapman*, 744

F. Supp. 1008 (D. Colo. 1990); *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985) (amendment to pension plan drafted by union that discriminated against employees who worked on non-union ships was arbitrary and capricious under ERISA). This practice began in 1987 (R32:1 rejected 4:673) and continued through October 1991 when four Triple A employees were informed that signing the note was a condition of becoming an apprentice (R12:6 rejected 4:673).

The Board and the panel failed to consider whether the maintenance of the latest agreement during the 10(b) period which facially discriminated in favor of members of the UA and against nonmembers overcame the presumption of a continuing majority after the expiration of the agreement.[5] Moreover, neither the Board nor the panel considered independent acts of coercion occurring both before and after the six month period before the charge was filed. Indeed, all such evidence was rejected.

Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960), involved a collective bargaining agreement that was facially legal and executed more than six months before the charge was filed. In denying enforcement of the

---

[5] The Board "found that the [expired] collective-bargaining agreement between the parties was a 9(a) contract, and remanded the case to the judge to address the merits of the complaint's allegations that the Respondent made unlawful unilateral changes and bypassed the Union by dealing directly with the employees." 315 NLRB 409, n.1 (1994). The ALJ refused to address Triple A's argument that "the Union never represented an uncoerced majority of its employees . . . because the Board's [October 19, 1993] decision resolves the matter." 315 NLRB at 411.

Board's order, the Court emphasized that "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed"; i.e. there was no evidence of any illegal activity within six months of the filing of the charge. *Id.* at 417. The Court stressed that where, as here, illegal activity occurred within six months of the filing of the charge, the 10(b) period, evidence of a union's lack of majority when the initial agreement was signed before the 10(b) period was admissible, stating at 416:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events.

In *Brannon Sand and Gravel Co.*, 289 NLRB 977, 981, 982 (1988), the Board rejected the proposition that voluntary recognition "carries with it an irrebutable presumption . . . of continuing majority status of the union" in 8(f) cases and held that in 8(f) cases it was permissible to go behind the 10(b) period because:

> Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or without the 10(b) period.

In *Allentown Mack Sales & Serv., Inc. v. NLRB*, ___ U.S. ___, 1998 U.S. LEXIS 649 at *8, *6 (January 26, 1998), the Court examined the Board's "presumption of continuing majority support for [a] union" and the evidence required to establish a " 'good faith reasonable doubt' about the union's majority support." The Court accepted the ALJ's finding "that Allentown was a 'successor' employer . . . and therefore inherited [its predecessor's] bargaining obligation and a presumption of continuing majority support of the union." *Id.* at *8. The Court emphasized that the Allentown union "had never won an election, or even an informal poll, within the actual unit of 32 . . . employees. Its claim to represent them rested entirely on the Board's presumption." *Id.* at *20.[6] The Court held that the Board could not "totally disregard[ ]" any "statement [which] would assuredly engender an *uncertainty* whether the speaker supported the union."[7] *Id.* at *18. The Court found that the Board's factual determinations were not supported by substantial evidence in the record, reversed the DC Circuit (83 F.3d 1483 (1996))

---

[6] The Allentown union had been recognized by the predecessor in 1973, more than fifteen years before the controversy arose. 316 NLRB 1199, 1202 (1995).

[7] Including statements that "arguably" support a doubt. *Id.* at *7.

and "remanded with instructions to deny enforcement." *Id.* at *38.

If 669 had achieved majority status through a secret ballot election with a ninety percent plurality on October 17, 1987, the chances of its losing its majority by April 1, 1991, would be less than had it won by only one vote; *a fortiori*, if 669 had never established a majority but only enjoyed a presumption of majority, it seems reasonable that it would take less objective evidence to establish a good faith doubt of lack of majority.

The Third and Sixth Circuits have refused to enforce Board refusal to bargain orders when, as here, the Board refused to consider pre-10(b) evidence relating to the original recognition of a union under § 9(a).

In *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 333 (6th Cir. 1973), the Sixth Circuit denied enforcement of a bargaining order and remanded to the Board to consider events relating to the union's tainted majority at the time the initial collective bargaining agreement was signed on the issue of "the mental attitude or good-faith doubt of the Company officials that the Union ever represented a majority of its employees." The Sixth Circuit held that:

> the circumstances surrounding the agreement gave the Company good reason to believe that the Union never did represent the uncoerced choice of a majority of its employees. The fact that this evidence could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissable for another purpose.

Id. at 333 (citing 1 Wigmore, Evidence § 13 (3d ed. 1940)).

In *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 482 (3d Cir. 1980), the court held that the Board erred in applying the six month statute of limitations of § 10(b) to exclude evidence concerning events surrounding the execution of the initial agreement, where the "factual findings of the ALJ . . . confirm the illegality of the original contract," because the union had not been selected by a majority of employees. The court rejected the Board's interpretation of *Bryan Mfg.* and remanded to the Board to consider the alleged "independent unfair labor practices occurring as to new employees hired within the six-month [10(b)] period" as well as the circumstances surrounding the execution of the initial agreement. *Id.* at 483, 485. On remand, 259 NLRB 302, 303 (1981), the Board found that the execution of the initial agreement containing a lawful union security clause when the union did not represent a majority of the employees coupled with the employer's, both before and after the 10(b) period, unlawfully requiring new employees to sign applications for membership and dues checkoff authorization at the time they were hired were "evidence of objective considerations supporting its good-faith doubt of the Union's majority status sufficient to rebut the Union's presumption of majority status."

Moreover, where, as here, the initial 9(a) agreement containing a union security provision was signed when the union did not represent a majority of the employees, "it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement." *Local Lodge No. 1424*, 362 U.S. at 414, citing *Bryan Mfg. Co.*, 119 NLRB 502, 546, 548 (1957).

Indeed, in *Shipwrecking, Inc.*, 136 NLRB 1518 (1962), the Board found that Shipwrecking, the employer, and Hod Carriers, the union, "since 1959 and at all times during the 6-month period preceding the filing of the charge . . . maintained a noncontractual hiring practice which, in effect, required all employees as a condition of continued, if not initial, employment to be members of the Union." The Board, in order to "effectuate the policies of the Act," ordered Shipwrecking to "[w]ithdraw and withhold recognition from [Hod Carriers] . . . until . . . [Hod Carriers] shall have been certified . . . by the Board," and ordered Hod Carriers to "[c]ease and desist from . . . [m]aintaining or giving effect to its current collective-bargaining agreement with Respondent Shipwrecking, or to any . . . other contract with the said Employer, unless and until Respondent Union shall have been certified as the exclusive bargaining representative by the Board." *Id.* at 1519, 1521, 1522.

The undisputed evidence establishes that 669 had the discriminatory provisions in its national agreements before Triple A was formed. We submit that it does not effectuate the policies of the Act to allow a union to profit from its pattern of egregious unfair labor practices which were designed to and did deprive employees of their right to refrain from supporting 669. *Gissel*, 395 U.S. at 610.